NO. 18-2103/18-2217

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

OZBURN HESSEY LOGISTICS, LLC,

PETITIONER – CROSS-RESPONDENT,

V.

NATIONAL LABOR RELATIONS BOARD,

RESPONDENT – CROSS PETITIONER

UNITED STEEL PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO, CLC,
INTERVENOR

On Appeal From the National Labor Relations Board
Case No. 15-CA-165554

REPLY BRIEF OF OZBURN HESSEY LOGISTICS, LLC

Ben H. Bodzy (TN Bar No. 23517)
GEODIS Logistics, LLC
7101 Executive Center Drive, Suite 300
Brentwood, TN 37027
ben.bodzy@geodis.com

Stephen D. Goodwin (TN Bar No. 6294)
BAKER, DONELSON, BEARMAN,
CALDWELL & BERKOWITZ, PC
165 Madison Avenue, Suite 2000
Memphis, TN 38103
sgoodwin@bakerdonelson.com

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ARGUMENT

The National Labor Relations Board (NLRB or Board) advances a theory that turns the concept of due process on its head. When the facts that were found by the Administrative Law Judge ("ALJ") and the National Labor Relations Board ("Board") are applied to the allegation that was pled in the Complaint and litigated at trial, the outcome is that Ozburn-Hessey Logistics, LLC ("OHL") wins this case. The facts do not establish, nor does the Board claim, that the unilateral change that was pled in the complaint led to Jermaine Brown's discharge.

In order to circumvent the defective theory of the General Counsel's Complaint, the Board applied a *post hac* rationalization to reverse-engineer a desired outcome, by finding a "second independent change to the Respondent's attendance policy" that was never alleged. (A. 3; Board Decision, p. 2). In so finding, the Board was forced to engage in intellectual jujitsu by changing its General Counsel's theory from a single unilateral change to two unilateral changes and from a change in October 2013 to changes that took place on an unspecified date and in an unspecified manner. The ends do not justify the means in this case.

I. The Board and Intervenor's Position Presents a Logical Paradox.

The Board and Intervenor's position presents a logical paradox because the unilateral change cannot simultaneously be "closely connected," while at the same time being a "separate independent change." The NLRB was faced with a

pleading decision when it tried this case. On the one hand, if it alleged that the 2-point rule was part of the same change as the new attendance policy in October 2013, then it was evident that Jermaine Brown's discharge was not caused by the unilateral change. If the 2-point rule was part of the same unilateral change as the attendance policy, then the net result is that Jermaine Brown's discharge was not caused by the change because the change has a net positive affect on Mr. Brown's attendance points. However, if it alleged that the 2-point rule was implemented through a separate independent subsequent change, then the Board would have to prove when the change happened and how the change happened, which it could not do and has not done to this day. Choosing to allege a separate independent subsequent change would have resulted in a failure of proof.

The General Counsel made its choice. It chose to plead that the unilateral change occurred at the time of the implementation of the new attendance policy. Now, it wants to be relieved of that choice through a change of theory that was never pled or tried.

II. The Board and Intervenor Have Not Shown that this case properly applied *Pergament*.

The Board claims that "both the finding and the allegation address the same facts and the same issue." (NLRB Br., p. 22). They further argue that "[b]oth involve the company's changes to its attendance policy and the points employees would receive for leaving work early." *Id*. The logical extension of this argument

is that any change whatsoever to the attendance policy is "closely related" to the change in October 2013, whether that is eliminating the attendance policy entirely or changing it to terminate employees for the very first violation, whenever those changes occurred, and regardless of whether they occurred independently of the change alleged in the Complaint.

The Board cites a number of non-6th Circuit cases to support its argument that the change found was "closely related" to the change alleged, all of which are distinguishable. However, cases cited by the Board underscore OHL's point in its Opening Brief that ***Pergament applies to unpled unfair labor practices, as opposed to unpled allegations of fact***. (OHL Br., p. 13). The Board cites *Intertape Polymer Corp. v. NLRB*, 801 F.3d 224, 233 (4th Cir. 2015), where the Fourth Circuit affirmed the application of *Pergament United Sales, Inc.*, 296 N.L.R.B. 333 (1989) to a finding of disparate enforcement of a rule regarding union literature, where the complaint had alleged a rule change regarding the same handling of union literature. Similarly, in *Davis Supermarkets v. NLRB*, 303 U.S. App. D.C. 193, 2 F.3d 1162 (1993), *Pergament* was applied to allow a new legal theory regarding mass layoffs, where the complaint alleged that the same layoffs were individually unlawful. In *Standard-Coosa-Thatcher*[1] *Carpet Yarn Div., Inc. v.*

[1] In *Standard-Coosa-Thatcher*, the complaint was also amended at the hearing to allege the new violation, which was not done in this case.

NLRB, 691 F.2d 1133 (4th Cir. 1982), the Fourth Circuit allowed a different legal theory to be applied to the same conversation that a personnel manager had with an employee. In *SEIU Local 32BJ v. NLRB*, 647 F.3d 435, 446 (2d Cir. 2011), the Second Circuit allowed the application of *Pergament* to allow an unpled successorship finding that was a necessary prerequisite to the violation alleged in the Complaint.

As the cases that the Board cites establish, *Pergament* applies to unpled legal theories; not unpled facts. In this case, the Board itself described the violation as a "second independent change." (A. 3; Board Decision, p. 2). That "second independent change" was a factual circumstance that was never alleged. Therefore, *Pergament* does not apply.

With respect to whether the allegation regarding the 2-point rule was "fully and fairly litigated," it was not. At trial, OHL questioned witnesses regarding whether the 2-point rule was part of the October 2013 rollout of the new attendance policy, which was the allegation in the Complaint. Witnesses were not questioned regarding whether the 2-point rule was part of a "second independent change" at an unspecified date in an unspecified manner. Regardless, the *Pergament* test is a conjunctive test, and the Court need not reach the issue of whether the allegation was "fully and fairly litigated" until the Board establishes that the allegation is "closely related."

III. The Motion to Amend Undermines the Board and Intervenor's Position in this Case.

There was a Motion to Amend in this case that is not directly related to the issue on appeal, but it demonstrates the absurdity of the Board and General Counsel's position articulated in their briefs. It was raised in Footnote 3 of OHL's Opening Brief, but not directly addressed by the Board or the Intervenor.

Immediately prior to resting his case, the General Counsel moved to amend the Complaint to add a new allegation that the change in the attendance policy included a change to how many points probationary employees would be permitted to accrue before termination. The change regarding probationary employees' attendance points was contained in the written policy that was rolled out in October 2013 (i.e. the change in policy that was being litigated at the trial). The ALJ denied the Motion to Amend, and the General Counsel appealed the denial of the Motion to Amend to the Board. In Footnote 1 of the Board's Decision and Order, the Board found "no merit in the General Counsel's exception to the judge's denial of his motion to amend the complaint to allege that the Respondent unlawfully changed the attendance policy for probationary employees." (A. 2; Board Decision, p. 1).

The Motion to Amend and its disposition demonstrate two points. First, the General counsel found it necessary to expressly move to amend the Complaint to allege a separate change that was found within the same policy change that was

being litigated. If an additional complaint allegation was necessary to address a separate change within the same written policy that was being litigated at the trial, then a motion to amend would certainly be necessary to address a separate change that allegedly occurred on a different date in a different manner. If it was not fair to allow an additional allegation relating to an attendance policy change during the trial, then it is certainly not fair to allow a finding on an additional allegation relating to an attendance policy change after the trial, which is what the Board did in this case.

Moreover, the ALJ denied the Motion to Amend, and the Board affirmed that denial. In doing so, the Board's rulings are entirely inconsistent. On the one hand, they affirmed the finding that it would be unfair to add an allegation arising from the same policy change that was being litigated, while at the same time finding that it would be fair to find a violation based on what the Board itself described as a "second independent change to the Respondent's attendance policy."

IV. OHL was not the lawbreaker that the Board paints it to be.

The Board's brief claims that OHL "unlawfully shunned its bargaining obligation." (NLRB Br. 36). While OHL acknowledges that it turned out to have a bargaining obligation, which is why it is not contesting the finding that it changed its attendance policy in October 2013, OHL did not "shun" its bargaining obligation. At the time that the policy was changed in October 2013, the outcome of the union's election was actively being litigated, and it would not be finally resolved until August 2016. Refusing to bargain is the recognized procedural mechanism to litigate the outcome of an election; not the "shunning of legal obligations" by a corporate outlaw. *See Wackenhut Corp. v. NLRB,* 336 U.S. App. D.C. 239, 178 F.3d 543, 548 (1999).

In a separate Board case, the Board's chairman noted in dissent the "Hobson's Choice created by this rule, which requires employers to choose between refraining from implementing changes that may be necessary for the business or giving the union notice and the opportunity to bargain that may subsequently be deemed unlawful if the union is not certified." *Ozburn-Hessey Logistics, LLC,* 366 NLRB No.177, fn. 1 of dissent (Aug. 27, 2018).

The Board cannot fairly equate a "Hobson's Choice" with shunning legal obligations.

V. CONCLUSION.

For all of the foregoing reasons, OHL respectfully requests that the Court grant its Petition for Review and deny the NLRB's Cross-Petition for Enforcement.

Respectfully submitted,

Ben H. Bodzy (TN Bar No. 23517)
GEODIS Logistics, LLC
7101 Executive Center Drive, Suite 300
Brentwood, TN 37027
ben.bodzy@geodis.com

Stephen D. Goodwin (TN Bar No. 6294)
BAKER, DONELSON, BEARMAN,
CALDWELL & BERKOWITZ, PC
165 Madison Avenue, Suite 2000
Memphis, TN 38103
sgoodwin@bakerdonelson.com

By: s/ Ben H. Bodzy
Attorney for Petitioner/Cross-Respondent

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of FRAP 32(a)(7)(B) because this brief contains 1,625 words, excluding the parts of the document exempted by FRAP 32(f). This brief also complies with the typeface requirements of FRAP 32(a)(5) and the type style requirements of FRAP 32(a)(6) because it has been prepared in Microsoft Word format using 14-point Times New Roman proportionally spaced typed font.

/s Ben H. Bodzy
Ben H. Bodzy

CERTIFICATE OF SERVICE

I hereby certify that on April 1, 2019 a copy of the foregoing Reply Brief was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by regular United States mail, postage prepaid. Parties may access this filing through the Court's electronic filing system.

/s Ben H. Bodzy
Ben H. Bodzy